STATE OF MICHIGAN

COURT OF APPEALS

IGOR BERGER, a/k/a GERALD BERGER, Plaintiff/Counter-Defendant-Appellee,	UNPUBLISHED July 28, 2011
v ALLA KATZ and PAUL KATZ, Defendants/Counter-Plaintiffs-Appellants.	No. 291663 Wayne Circuit Court LC No. 07-707413-CZ

IGOR BERGER, a/k/a GERALD BERGER, Plaintiff-Appellant,	
v ALLA KATZ and PAUL KATZ, Defendants-Appellees.	No. 293880 Wayne Circuit Court LC No. 07-707413-CZ

Before: WILDER, P.J., and SAAD and DONOFRIO, JJ.

WILDER, P.J. (*dissenting in part*).

I respectfully dissent from part VI of the Court's opinion awarding case evaluation sanctions to plaintiff.

In this case, as the majority opinion concedes, the case evaluation panel disregarded MCR 2.403(K)(2) when it issued one award for plaintiff's claims against both defendants. Plaintiff did not object, however, and therefore, the trial court correctly interpreted the award in accordance with the court rule, finding that there was a net award of $50,000 against *each* defendant. The trial court then compared these awards to the jury verdict of $22,000 against each defendant pursuant to MCR 2.403(O)(4)(a), which clearly prohibits aggregating an award: "in determining whether the verdict is more favorable to a party than the case evaluation, the court *shall* consider only the amount of the evaluation and verdict as to the particular pair of parties, rather than the aggregate evaluation or verdict as to all parties." (Emphasis added.)

When construing a court rule, the word "shall" indicates a mandatory provision. *Howard v Bouwman*, 251 Mich App 136, 145; 650 NW2d 114 (2002).

Furthermore, in my judgment, consideration of whether defendants, as counter-plaintiffs, bettered their position is not warranted. While courts are prohibited from aggregating mediation awards amongst *multiple defendants*, courts must aggregate the awards stemming from claims and counter-claims amongst *particular pairs of parties*. MCR 2.403(O)(4)(a); see also *Minority Earth Movers, Inc v Walter Toebe Const Co*, 251 Mich App 87, 94; 649 NW2d 397 (2002) ("[M]ediation evaluations on a claim and counterclaim are to be treated as a whole for purposes of acceptance or rejection."). Under the applicable case law and court rule, then, it is inappropriate to view in isolation only one side's award from a claim or counter-claim. Instead, a court is required to consider a plaintiff's aggregate award against each particular defendant. Here, for the reasons stated above, the mediation panel is considered to have awarded plaintiff a net amount of $50,000 against Alla Katz. Because the jury verdict only awarded plaintiff $22,000 against Alla, plaintiff is not entitled to sanctions against Alla. Likewise, because the mediation panel awarded plaintiff $50,000 against Paul Katz and the jury only awarded $22,000, plaintiff is not entitled to sanctions against Paul either.

Finally, I disagree with the majority's conclusion that defendants waived or forfeited[1] their right to have MCR 2.403(O)(4)(a) enforced because *they* did not object to the form of the mediation award. As noted earlier, neither plaintiff nor defendants objected to the mediation award's form. *Any* party that fails to make such an objection may not later seek to view the award contrary to the plain language of MCR 2.403(O)(4)(a). Cf. *Roberts v Mecosta Co General Hosp*, 466 Mich 57, 64-67; 642 NW2d 663 (2002) (the failure of the defendant in a medical malpractice case to object to the adequacy of the plaintiff's notice of intent did not constitute a waiver of the notice's requirements that were listed in the plain language of the statute). Thus, in my judgment, plaintiff forfeited the ability to have the $50,000 mediation award treated as anything other than $50,000 against each defendant when he failed to object to its form.

/s/ Kurtis T. Wilder

[1] Because waiver is the "intentional relinquishment or abandonment of a known right" and the parties appeared to have done nothing other than fail to object to the manner of the mediation award, their actions are more akin to forfeiture, which is merely the failure to object. *People v Carines*, 460 Mich 750, 763 n 7; 597 NW2d 130 (1999).